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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. MC KEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Motion of The Atchison, Topeka and Santa Fe Railway Company To Correct Caption and To Be Named a Respondent and Brief for Respondent, The Atchison, Topeka and Santa Fe Railway Company, in Opposition

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Motion of The Atchison, Topeka and Santa Fe Railway Company To Correct Caption and To Be Named a Respondent Herein

In the caption of this case as set forth in the petition for writ of certiorari, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) is not named as a respondent. The petition is essentially an attack upon a decision of the California Public Utilities Commission, upheld without opinion by the California Supreme Court, involving reduced freight rates of the Santa Fe. Santa Fe was a re-

spondent in the Commission proceedings and actively participated therein. By California statute Santa Fe is a real party in interest, entitled as a matter of right to participate in the review proceeding before the State Supreme Court and Santa Fe did actively participate.[1] It will be directly and substantially affected by the Court's action herein. The petition for writ of certiorari was served upon Santa Fe.

Wherefore, The Atchison, Topeka and Santa Fe Railway Company respectfully moves that it be designated a party respondent and that the title and caption of this proceeding be amended accordingly. The brief of this company as a respondent in opposition to the petition is attached.

Respectfully submitted.

FREDERICK G. PFROMMER
114 Sansome Street
San Francisco, California

Attorney for The Atchison, Topeka and Santa Fe Railway Company

Dated at San Francisco this 21st day of September, 1964.

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1. "The commission and each party to the action or proceeding before the commission may appear in the review proceeding." Section 1758, Public Utilities Code of the State of California. To the same effect is Rule 58(b) of the Rules on Original Proceedings in Reviewing Courts of the Supreme Court of the State of California.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent, The Atchison, Topeka and Santa Fe Railway Company, in Opposition

OPINIONS BELOW

The opinion of the Public Utilities Commission of the State of California, which is really the subject of this petition, is entitled *Decision No. 66487, Case No. 7598*, and

is reported at 62 Cal. P.U.C. 49.[1] Printed copies of the advance sheet containing this opinion were filed with the petition.

The subject opinion of the Public Utilities Commission of the State of California (hereinafter called State Commission) shows that The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) was a respondent in the Commission proceedings. By California statute Santa Fe is made a real party in interest, entitled as a matter of right to participate in the eview proceeding before the State Supreme Court and Santa Fe did so participate. Santa Fe files this brief as a respondent here.

JURISDICTION

The petition invokes jurisdiction of the Court only under 28 U.S.C. § 1257(3) which applies where the validity of state action is challenged as repugnant to the Constitution, treaties or laws of the United States.

QUESTION PRESENTED

Although the petition is phrased to present a question whether the State can constitutionally sanction illegal discrimination, i.e., lower transportation rates for some shippers than for others similarly situated, the Commission's decision is clearly based on the factual ground that petitioner and "the other shippers" are not similarly situated and that the difference in rate treatment is justified.

Therefore, petitioner's statement of the case requires correction so that it reflects what the State Commission actually found to be the facts. Such restatement demonstrates that the petition is without basis.

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1. It will be hereinafter cited by volume and page only.

STATEMENT OF THE CASE

Reduced intrastate railroad rates were published by Santa Fe from certain cement plants but not from petitioner's plant. As a consequence petitioner's former rate advantage was reduced.[2] Upon its request, effectiveness of the reduced rates was suspended by the State Commission pending full investigation and determination whether the reduced rates would be unlawful in any respect. After seven days of hearing and due deliberation, the State Commission entered its opinion and order that the reduced rates had been shown to be lawful and permitting them to become effective. It denied petitioner's request for a rehearing and the Supreme Court of California denied a petition for writ of review.

Petitioner's plant is at Monolith, California, on railroad track owned by Southern Pacific Company (Southern Pacific) and over which Santa Fe has trackage rights by agreement with Southern Pacific. The agreement provides Santa Fe may use this track only to "bridge" traffic and if it originates or terminates traffic at points on this Southern Pacific-owned line, it must pay a substantial extra charge on such traffic in addition to the regular rental and other user charges which apply on all traffic moving on the line. Such provisions, imposing a penalty where the "tenant" railroad uses the leased line to originate or terminate traffic, as contrasted with "bridging" over it, are typical of many joint trackage agreements. For example, see *Burlington-R. I. R.R. Abandonment*, 247 I.C.C. 79, 82. In some instances, the user is prohibited from doing any local business on the joint track.

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2. It should be emphasized that its advantage was only reduced, not removed.

". . . [I]t was provided that the Pacific Company should do no business at intermediate points." *Union Pac. Ry. v. Chicago, R. I. & Pac. Ry.*, 163 U.S. 564 (1896).

Santa Fe published reduced rates on cement from mills located on its line. It did not reduce its rates from Monolith on the Southern Pacific-owned tracks because, as found by the State Commission (62 Cal. P.U.C. at 59), Santa Fe's rates from Monolith were already non-compensatory, being less than out-of-pocket costs.

Most of the decision of the State Commission is concerned with petitioner's contention that it would be unlawfully discriminated against or unlawfully prejudiced unless Santa Fe were required to publish reductions in its rates from Monolith on Southern Pacific-owned track commensurate with the reductions in rates Santa Fe proposed from the cement mills on its own track. The Commission did indeed observe that the *physical* transportation of cement from Monolith and from the other mills is comparable. But the Commission also pointed out that although the Santa Fe must pay Southern Pacific the additional charge when it originates traffic at Monolith, "[n]o such payment is required in connection with freight transported over the joint track that does not have origin or destination on the joint track." (62 Cal. P.U.C. at 57.) It described that extra cost as

> ". . . an out-of-pocket expense in that it is directly applicable to the shipments involved. Said expense is one that accrues in connection with shipments transported by respondent from Monolith and does not accrue in connection with shipments originating at Oro Grande and transported to destinations north of Kern Junction. That expense, therefore, is a condition of transportation of shipments from Monolith not present in the transportation of shipments from Oro Grande." (62 Cal. P.U.C. at 58.)

And it said,

> "We find: The suspended rates are above out-of-pocket costs and are compensatory whereas the existing rates from Monolith to San Joaquin Valley points are already below out-of-pocket costs and hence are already not compensatory and are insufficient; and by reason of the foregoing, the suspended rates are not unreasonably low in relationship to the rates from Monolith to San Joaquin Valley points; they do not grant any undue preference or advantage to American Cement Corporation, Permanente Cement Company and Southwestern Portland Cement Company; or subject Monolith Portland Cement Company to any undue prejudice or disadvantage in connection with the transportation of bulk cement from their respective plants to San Joaquin Valley points; and, the suspended rates do not unjustly discriminate against Monolith Portland Cement Company or the locality of Monolith in connection with transportation of bulk cement to San Joaquin Valley points." (62 Cal. P.U.C. at 59-60.)[3]

Having found that the subject rates were not unlawful when considered in connection with Monolith's rates to the same points, the State Commission then turned to Monolith's contention that the suspended rates into the San Joaquin Valley were unlawful when compared with Monolith's rates into southern California. It considered at some length that "[t]here are, however, differences in transportation circumstances and conditions which relate to comparisons of the suspended rates on mileage bases with the rates from Monolith to the southern points." (62 Cal. P.U.C. at 61.)

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3. Compare petitioner's grossly incorrect statement that ". . . . the Commission found as a fact that all the actual costs and circumstances of transportation were the same for petitioner as for its competitors." (Petition, page 5.)

It detailed the various differences and among other things, specifically said:

> "We find: . . . There are circumstances and conditions surrounding the transportation of cement from Monolith to southern points by respondent that are not similar to those surrounding the transportation of cement in bulk from Oro Grande, Victorville and Cushenbury to San Joaquin Valley points, including, the additional expense of 3.6 cents per 100 pounds on shipments originating at Monolith, the routing of shipments via Santa Fe under its local rates is not the shortest route from Monolith to many of the southern points involved herein, and the market for cement for the Feather River Project construction in the San Joaquin Valley is actual, whereas that market in the southern points area is potential." (62 Cal. P.U.C. at 63.)

And the Commission made further findings and concluded that there was no undue preference or prejudice nor unlawful discrimination and that the rates were justified by transportation conditions.

ARGUMENT

The petition specifies four numbered reasons why writ of certiorari should be granted: (1) the benefits of the agreement under which Santa Fe uses Southern Pacific tracks inure to all of the railroad customers and the extra cost incurred in originating traffic at Monolith "must be spread against all traffic that moves over such track"; (2) the state action is in conflict with decisions of this Court in the area of federal transportation law; (3) the Interstate Commerce Commission does not regard the extra cost at Monolith as justifying discriminatory rates; and (4) the state action violates national transportation policy.

1. Whether an Unlawful Discrimination Exists Is a Question of Fact and No Substantial Federal Question Is Involved.

The rates in question apply only on intrastate commerce. The State Court has said

> "Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist. The true principle which governs the instant case is correctly stated in *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 33 Sup. Ct. 893, 57 L.Ed. 1446, Ann. Cas. 1915A, 315. In dealing with the reasonableness of rates and permissible discrimination based upon differences of conditions, it is there said: 'Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon a difference in conditions are not matters of law. . . .'" *Live Oak Water Users' Ass'n v. Railroad Comm'n*, 192 Cal. 132, 143, 219 Pac. 65, 69 (1923), writ of error dismissed, 269 U.S. 354 (1926). To the same effect, see *California Portland Cement Co. v. Public Util. Comm'n*, 49 Cal. 2d 171, 175, 315 P.2d 709, 711 (1957).

As suggested in the foregoing quotation, even if the matter were one of federal law the rule would be no different, for as this Court has recently said,

> ". . . differences in rates as between shippers are prohibited only where the 'circumstances and conditions' attending the transportation service are 'substantially similar.' Whether those circumstances and conditions

are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination." *Barringer & Co. v. United States*, 319 U.S. 1, 6 (1943).

The State Commission found as a fact that petitioner and its competitors were not in substantially similar situations and concluded that the rate differential was not unlawful. This finding having been made as a valid exercise of state regulatory authority respecting state rates, there is plainly no federal constitutional issue. Thus, while it is true that the decision may not be based on an arbitrary classification, neither does that principle provide a basis for reweighing the evidence. Petitioner's argument that the benefits of the trackage agreement inure to all the railroad's customers and that the extra cost of originating traffic at Monolith should not be charged against such traffic alone, but "must be spread against all traffic that moves over such track" is no more than a contention that the State Commission incorrectly weighed the evidence. The allegation of unconstitutionality is based on nothing more than the argument that the decision was wrong. No substantial federal question is presented. *Baltimore & O. R.R. v. United States*, 305 U.S. 507, 526 (1939); *Transamerican Freight Lines, Inc. v. United States*, 51 F.Supp. 405 (D.C. Del. 1943); *Lang Transp. Co. v. United States*, 75 F.Supp. 915 (S.D. Cal. 1948).

2. There Is No Support for the Argument That These Intrastate Rates Would Have Been Unlawful If Interstate and That, Therefore, Their Approval Violates the Constitution.

Petitioner argues that various federal authority holds that the present situation would constitute unlawful discrimination if in interstate commerce and

> "Plainly, a factual situation which would offend the Interstate Commerce Act if the commerce were interstate, violates the [federal] constitutional guarantee when the factual context is state approval of acts in intrastate commerce by interstate railroads." (Petition, page 14.)

In the first place, the cases cited by petitioner do not compel the conclusion that the Interstate Commerce Commission would have reached a different decision if it had this same case before it involving interstate rates. But this point was carefully argued before the State Commission and does not bear repetition at this stage.

Moreover, even assuming the I.C.C. would have reached a different conclusion, such fact would be immaterial, for this proceeding concerns a state order regulating intrastate rates as a valid exercise of the state power. The argument that State Commission action respecting intrastate rates is a deprivation of equal protection of the laws unless it reaches the same result the I.C.C. would have reached if the rates were interstate, is not supported by logic, let alone the Constitution. In the same category is the argument that certiorari should be granted because the state action involving intrastate rates violates "the national transportation policy of non-discriminatory transportation rates." These are merely tenuous arguments advanced in an effort to create a federal question where none exists.

CONCLUSION

Although petition alleges a violation of the federal constitution, the situation involves only the valid exercise of state regulatory power respecting intrastate rates. No substantial federal question is involved and the petition should be denied.

Respectfully submitted,

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